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IN THE

Supreme Court of the United States

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA
and THE ALABAMA DEPARTMENT OF YOUTH SERVICES,

Petitioners,

—v.—

PATRICIA GARRETT and MILTON ASH,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENTS PATRICIA GARRETT AND MILTON ASH

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Dated August 11, 2000

46 pp

QUESTION PRESENTED

Do Title I and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213, exceed Congress' enforcement authority under Section 5 of the Fourteenth Amendment?

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INTEREST OF *AMICUS CURIAE*

The American Bar Association ("ABA") is the leading national membership organization of the legal profession with more than 404,000 members.[1] Its members include attorneys in private practice, attorneys for non-profit organizations and corporations, prosecutors and public defenders, legislators, law professors, and students, as well as non-lawyer associates in related fields.

The ABA has an interest in this case because the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994) ("ADA"), is a critical piece of civil rights legislation that provides recourse for those discriminated against on the basis of disability. The ABA has a long-standing commitment to equality under the law, and has expressed strong support for federal legislation to address discrimination against people with disabilities, including the ADA. Further, many ABA members with disabilities have a direct interest in the continued viability of the ADA as a shield against discrimination. One of the ten goals of the ABA is "to promote full and equal participation in the legal profession by minorities, women and persons with disabilities."

Indeed, as early as 1945, the ABA created its Special Committee on the Rights of the Mentally Ill. This committee was the predecessor to the Commission on the

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, *amicus curiae* discloses that no part of this brief was authored by counsel for a party in this action, nor did any person or entity make a monetary contribution to the preparation or submission of this brief, and letters of consent are on file with the Clerk of the Court.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the position in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

Mentally Disabled, which the ABA established in 1973 and which became the ABA Commission on Mental and Physical Disability Law (the "Commission") upon the passage of the ADA. In 1976, the ABA began publishing what is now called the *Mental and Physical Disability Law Reporter*, currently the most exhaustive publicly available periodical on disability law.[2] Over time, the ABA has undertaken numerous initiatives to correct significant abuses by states in denying equal opportunities to people with disabilities. These have included promoting legislative and regulatory reform and monitoring mental health institutions. For example, in both 1976 and 1978, the ABA supported initiatives to ensure access to public buildings and transportation for people with physical disabilities. In 1977, the ABA through its House of Delegates adopted a resolution supporting federal, state and local legislation designed to further equal employment opportunities for people with disabilities. Throughout the late 1970s and the 1980s, the ABA continued to sponsor initiatives to promote the rights of people with disabilities.

All these activities culminated in 1989, a year before the enactment of the ADA. In that year the ABA took an historic step, adopting a resolution recommending passage of federal legislation that prohibits disability discrimination "in a manner parallel to existing prohibitions on discrimination based on race, sex, national origin, and religion." The resolution explicitly called for federal legislation "to ensure equal opportunities for individuals with

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[2] An introductory statement to the *Reporter* explained its purpose:

> The Commission believes that clients of the mental disability system and other mentally disabled individuals will achieve full enjoyment of their legal rights only when members of the bar, responsible goverment officials, service providers, lay advocates, and consumers understand and are equipped to implement these rights. . . .

Summary and Analysis, 1 Mental Disability L. Rep. 5 (1976).

disabilities in employment, public accommodations and services (including mass transportation), telecommunications, *and activities of State and local governments.* . . ." (emphasis added).

The ABA supports the ADA as the embodiment of the principles set forth in its resolution. The ABA is convinced that the ADA is essential federal legislation that prohibits discrimination on the basis of disability and seeks to ensure equal opportunities, taking into consideration the economic benefits and costs, and providing clear standards for identifying such discrimination, without imposing undue hardship upon the states.

Based on decades of work on state and national legislation dealing with disabilities and the ABA's commitment to the principles of equal rights, the ABA has a special perspective to provide and a strong interest in the matter before the Court.

SUMMARY OF THE ARGUMENT

The ADA is a proper exercise of Congress' enforcement power under Section 5 of the Fourteenth Amendment to take remedial and prophylactic action to combat discrimination on the basis of disability. Unlike the age classification analyzed in *Kimel v. Florida Board of Regents*, __ U.S. __, 120 S. Ct. 631 (2000), the ADA is based on a record documenting that states have made many distinctions on the basis of disability that have been both invidious and irrational. While the states have played a complex role in providing care for individuals with disabilities, giving rise to the level of deference accorded by this Court in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), this history should not be mistaken for an absence of state discrimination. To the contrary, states' warehousing of people with disabilities in institutions, states' failure to ensure access to the ballot,

and state employers' discrimination against people with disabilities demonstrate the invidious nature of state conduct.

Moreover, although classifications on the basis of disability do not trigger strict judicial scrutiny, *see Cleburne*, 473 U.S. at 446, whether Congress acted within its enforcement power is not determined by the level of scrutiny to be applied. The enactment of the ADA was within Congress' power to enforce the constitutional prohibition against invidious and irrational discrimination on the basis of disability. Indeed, discrimination on this basis has operated on similar foundations as discrimination on the basis of race, ethnicity and gender—*i.e.*, stereotypes and notions of inferiority, stigma, and psychological discomfort with difference—and historically has taken analogous forms, such as segregation and other discriminatory state practices.

The ADA is not an attempt to redefine substantively the scope of the Fourteenth Amendment. It is, instead, a congruent and proportionate response that falls well within constitutional bounds.

ARGUMENT

I. THE RECORD BEFORE CONGRESS IN 1990 CONTAINED AMPLE EVIDENCE THAT STATES SEGREGATED AND DISCRIMINATED AGAINST PEOPLE WITH DISABILITIES AND DENIED THESE INDIVIDUALS FUNDAMENTAL RIGHTS.

The issue before the Court is whether Congress acted pursuant to a valid grant of constitutional authority when it enacted the ADA. *See Kimel*, 120 S. Ct. at 640; *Semi-*

nole Tribe v. Florida, 517 U.S. 44, 55 (1996).[3] The ABA submits that the ADA is within Congress' constitutional authority as an exercise of its powers under Section 5 of the Fourteenth Amendment, which necessarily limits the Eleventh Amendment and grants Congress the authority to abrogate states' sovereign immunity. *See Kimel*, 120 S. Ct. at 644; *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).[4]

Legislation is consistent with the Eleventh Amendment when there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). In applying the "congruence and proportionality" test, this Court concluded that neither the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (1994), nor the Age Discrimina-

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[3] A federal statute properly subjects states to suits by individuals if, as here, Congress unequivocally expressed its intent to abrogate the states' immunity, and Congress "effectuated that abrogation pursuant to a valid exercise of constitutional authority." *Kimel*, 120 S. Ct. at 640. The ADA clearly satisfies the first prong. *See* 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter."); 42 U.S.C. § 12101(b) ("It is the purpose of this Act . . . (4) to invoke the sweep of Congressional authority including the power to enforce the fourteenth amendment. . . ."). Thus, the analysis turns to whether Congress' action was within its authority under the Constitution.

[4] The Fourteenth Amendment provides, in relevant part:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . .
>
> Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

tion in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (1994), was appropriate legislation under Section 5 of the Fourteenth Amendment. *See City of Boerne*, 521 U.S. at 536; *Kimel*, 120 S. Ct. at 645. In each case, the Court found that the legislative record failed to reveal widespread patterns of unconstitutional conduct. *See City of Boerne*, 521 U.S. at 530; *Kimel*, 120 S. Ct. at 648-49. In contrast, the ADA is based on a significant history of state discrimination against people with disabilities. In passing the ADA, Congress acted on the basis of a compelling, lengthy and detailed factual predicate, determining that people with disabilities have been subjected to invidious prejudice and discrimination, and have had their rights abridged or denied. *See, e.g.*, H.R. Rep. No. 101-485, pt. 2, at 29-32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 310-13; H.R. Rep. No. 101-485, pt. 1, at 24-25 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 268; H.R. Rep. No. 101-485, pt. 3, at 24-26 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 447-49; Sen. Rep. No. 101-116, at 5-15, 18-19 (1989).[5]

As this Court noted in *Olmstead v. L.C.*, 527 U.S. 581 (1999), the ADA incorporated Congressional findings that "individuals with disabilities continually encounter various forms of discrimination" and "historically, society has tended to isolate and segregate individuals with disabilities. . . ." *Id.* at 588-89 (citing 42 U.S.C. § 12101(a)(2), (5)). These findings are consistent with this Court's protection of the liberty interest of people with disabilities reflected in opinions preceding *Olmstead*. *See*,

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[5] Moreover, when determining whether Congress enacted a statute pursuant to its Section 5 power, "courts have always been free to consider evidence beyond that which is contained in the legislative record." *Kilcullen v. New York State Dep't of Labor*, 205 F.3d 77, 80 (2d Cir. 2000) (citing *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 200, 209, 211-12 (1997), and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 646 (1999)).

e.g., *O'Connor v. Donaldson*, 422 U.S. 563, 574-75 (1975) (observing that the state may not "fence in the harmless mentally ill solely to save its citizens from the exposure to those whose ways are different").

The record before Congress in 1990 was replete with examples of egregious conduct by the states—segregatory practices, laws that categorically denied people with disabilities fundamental rights, and other forms of invidious and irrational discrimination.

A. State Segregation and Mistreatment of People With Disabilities Within Institutions Have Been Particularly Egregious.

By the time of the ADA's enactment, it was well known that throughout this country's history many people with disabilities were continually subjected to segregation and institutionalization.[6] The findings of fact supporting the ADA point to segregation and institutionalization as a "serious and pervasive social problem." 42 U.S.C. § 12101(a)(2).

As Congress was aware, the deleterious consequences of state sponsored institutional segregation extended not only to the stigmatization of people with disabilities and limitations on access to community life, *see Olmstead*, 527 U.S. at 600 (segregation in institutions of people with disabilities "perpetuates unwarranted assumptions that people so isolated are incapable or unworthy of participating in community life"), but also to abuse and mistreatment found to be unconstitutional by several district

[6] The ADA was the latest in a series of steps Congress took to address overly restrictive placements of people with disabilities, including the enactment of the Developmentally Disabled Assistance and Bill of Rights, Pub. L. No. 88-164, 77 Stat. 282, (codified as amended 42 U.S.C. §§ 6000-6083 (1994)), and the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§701-796 (1994)). *See Olmstead*, 527 U.S. at 599-600.

courts.[7] *See, e.g., New York State Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752, 765 (E.D.N.Y. 1973) ("*NYSARC*"). Congress also had before it this Court's decisions in *O'Connor*, 422 U.S. at 563, and *Youngberg v. Romero*, 457 U.S. 307 (1982), documenting the confinement of the harmless mentally ill and the states' failure to provide for basic health and safety needs of residents with mental retardation.

One example of the judicial record before Congress involved the Willowbrook State School for the Mentally Retarded ("Willowbrook"). *See NYSARC*, 357 F. Supp. at 752. Beginning eighteen years before the enactment of the ADA, District Judge Orrin G. Judd issued several decisions detailing some of the abuses to which Willowbrook patients had been subjected.[8] In an early decision,

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[7] Congress' attention to the problems of institutionalization stretches back at least to the enactment of the Rehabilitation Act. Senator Humphrey, the bill's sponsor, stated: "I am calling for public attention to three-fourths of the Nation's institutionalized mentally retarded who live in public and private residential facilities which are more than 50 years old, functionally inadequate and designed simply to isolate these persons from society. . . ." 118 Cong. Rec. 525 (1972).

[8] Willowbrook was one of the examples of the "problems with large-scale residential institutions for handicapped people" discussed in *Accommodating the Spectrum of Individual Abilities*, on which Congress relied in considering the ADA. U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 32 n.112 (1983) ("*Accommodating the Spectrum*"); H.R. Rep. No. 101-485, pt. 2, at 31 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 312. The report also cited *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1972), 344 F. Supp. 1341 (M.D. Ala. 1972), *aff'd in part, rev'd in part sub nom. Wyatt v. Aderholt*, 502 F.2d 1305 (5th Cir. 1974), and *Halderman v. Pennhurst State School and Hospital*, 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part, rev'd in part*, 612 F.2d 84 (3d Cir. 1979), *rev'd on other grounds*, 451 U.S. 1 (1981), as examples of the problems of institutionalization and the need for deinstitutionalization. *See Accommodating the Spectrum* nn.113, 119.

the court found that abuses at Willowbrook, a facility warehousing approximately 6200 children and adults in 1969, had continued unabated despite legislative findings dating from 1964 that indicated severe problems at the institution. *See id.* at 755, 756. Even that most basic of rights, the right to be free from physical harm, was denied the Willowbrook residents. *See id.* at 764-65.

Physical conditions at Willowbrook were horrific. The court found that residents were left unclothed or in filthy clothes; that all of the wards had non-functioning and overflowing toilets and sinks; and that sanitation was miserable. *See New York State Ass'n for Retarded Children, Inc. v. Carey*, No. 72 Civ. 356/357, 10-12, 15 (E.D.N.Y. Apr. 28, 1982) (Order to Appoint Special Master) ("*Willowbrook Order*").

Willowbrook residents were also deprived of other basic necessities. Many had "pipestem legs," a sign of inadequate nutrition, *id.* at 34, and lacked bedding, furniture, proper medical treatment, and programming that might have allowed them to maintain or learn skills. *See id.* at 13, 18. In 1982, more than ten years after the court's initial findings of fact and seven years after the entry of a consent decree, *see New York State Association for Retarded Children, Inc. v. Carey*, 393 F. Supp. 715 (E.D.N.Y. 1975), plaintiffs returned to court seeking the appointment of a special master to force compliance by state defendants. The court found that many of the problems identified earlier continued essentially unchanged. *See Willowbrook Order*, No. 72 Civ. 356/357, at 10, 15.

Indeed, Willowbrook was not an aberration; many other federal district courts were forced to intervene to protect the rights of segregated mentally ill and retarded residents of state institutions. *See, e.g., Halderman v. Pennhurst State School and Hosp.*, 446 F. Supp. 1295, 1303-09 (E.D. Pa. 1977), *aff'd in part, rev'd in part*, 612 F.2d 84 (3d Cir.

1979), *rev'd on other grounds*, 451 U.S. 1 (1981); *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1972), 344 F. Supp. 1341, 1343 (M.D. Ala. 1972), *aff'd in part, rev'd in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). Federal decisions documented "dehumanizing" physical environments, "degrading and humiliating admission procedures, . . . critically substandard" ventilation problems, fire hazards and overcrowding, inferior food, and lack of adequate treatment and habilitation services. *Wyatt*, 334 F. Supp. at 1343. *See also Pennhurst*, 446 F. Supp. at 1303-08 (dehumanizing conditions).

The persistence of unconstitutional conditions at the various state institutions was due, at least in part, to the segregation inherent in institutionalization. It reflects antipathy and indifference to, as well as the political disempowerment of, individuals whose major life activities are limited by physical impairments. As the court wrote in *Pennhurst*, "few of the retarded are in a position to aid or protect their fellow residents or to complain about their own treatment. Pennhurst is isolated and segregated from the community." *Pennhurst*, 446 F. Supp. at 1320-21. The U.S. Commission on Civil Rights also noted that the use of institutions, which become isolated enclaves, generally situated in rural areas, resulted in segregation from family, friends and society. *See* U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 33 (1983) ("*Accommodating the Spectrum*").

The legislative findings supporting the enactment of the ADA show that Congress recognized that segregation and institutionalization continued to exist as forms of disability-based discrimination and that Congress intended to provide a remedy for this historic form of discrimination through the enactment of the ADA. As this Court recently acknowledged:

> [I]n findings applicable to the entire statute, Congress explicitly identified unjustified "segrega-

> tion" of persons with disabilities as a "for[m] of discrimination." *See* § 12101(a)(2) ("historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem"); § 12101(a)(5) ("individuals with disabilities continually encounter various forms of discrimination, including . . . segregation.").

Olmstead, 527 U.S. at 600. *See also* H.R. Rep. No. 101-485, pt. 2 at 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 310 (listing "segregation" as a form of "discrimination against people with disabilities"); H.R. Rep. No. 101-485, pt. 3, at 26 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 449 ("The ADA is a comprehensive piece of civil rights legislation which promises a new future: a future of inclusion and integration, and the end of exclusion and segregation.").

B. States Have Infringed the Voting Rights of People With Disabilities.

The record before Congress contained numerous examples of the ways in which states have denied people with disabilities access to polling places and limited their opportunities to participate in the political process. *See* Hearing before House Subcomm. on Select Educ., 101st Cong. 189 (Oct. 24, 1988); Hearing before House Subcomm. on Select Educ., 101st Cong. 41 (Oct. 6, 1989); 1 Law Reform in Disability Rights B2-10 (1981) (many states disenfranchise disabled voters based on classifications of mental disability in exercising their qualified right to determine conditions under which the right to vote may be utilized).

As this Court has recognized, the right to vote is a fundamental interest that may well represent the ultimate per-

sonal right "because [it is] preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966); *Dunn v. Blumstein*, 405 U.S. 330 (1972). While the states are vested with the power to determine the conditions under which the franchise may be exercised, *see Lassiter v. Northampton County Board of Education*, 360 U.S. 45 (1959), once the power to vote is granted to the electorate, the lines drawn on suffrage may not be inconsistent with the Equal Protection Clause of the Fourteenth Amendment. *See Harper*, 383 U.S. at 665.

Notwithstanding the critical importance of the franchise, the historical record is filled with examples of discriminatory state action impairing the voting rights of people with disabilities. These impairments include categorical disenfranchisement, lack of access to the ballot box, and the removal of the secret ballot.

More than two-thirds of the states continue to have categorical restrictions that disenfranchise people with cognitive impairments.[9] At least nine of these states use the vague terminology "idiots and insane persons" to disenfranchise potential voters. With these overly restrictive laws as a backdrop, state officials have refused to register disabled voters based on these laws. In *Carroll v. Cobb*, 139 N.J. Super. 439 (N.J. Super. Ct. App. Div. 1976), a New Jersey state appellate court overruled a board of election ban, stating "that a mentally retarded person need not be an 'idiot,' and a mentally ill person need not be 'insane.' " *Id.* at 450. *See also Manhattan*

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[9] *See* Appendix A. For example, the Alabama Constitution provides, "The following persons shall be disqualified both from registering, and from voting, namely: All idiots and insane persons." Ala. Const. art. VIII, § 182. Similarly, by statute Arizona bans "incapacitated" people from registering to vote and includes people with physical disabiltities among the groups that can be declared incapacitated. Ariz. Rev. Stat. § 16-101(A)(6) (1984).

State Citizen's Group, Inc. v. Bass, 524 F. Supp. 1270 (S.D.N.Y. 1981) (holding unconstitutional the disenfranchisement of people involuntarily committed to hospitals by court order but not declared incompetent). Yet because of the wide latitude frequently granted by the statutes, state agencies have often misused their power in disenfranchising people with disabilities. *See, e.g., I/M/O Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hospital*, 331 N.J. Super. 31 (N.J. Super. Ct. App. Div. 2000).

Registration requirements have also served as a significant barrier to political participation. Before the passage of the ADA, most states did not allow accessible registration and instead required trips to the board of elections in order to register, thereby restricting access for people with mobility impairments. *See* Frances Fox Piven & Richard A. Cloward, *Why Americans Don't Vote* 178 (1988). Prior to 1917, no state provided for absentee balloting for the physically disabled, effectively disenfranchising the home or hospital bound. *See* George Fredrick Miller, *Absentee Voters and Suffrage Laws* 48 (1948). The use of absentee ballots remains limited in some states.[10]

As three recent actions in New York demonstrate, the problem of access continues today. *See People v. County of Delaware*, 82 F. Supp.2d 12 (N.D.N.Y. 2000) (failure of local officials to provide accessible polling places); *People v. County of Schoharie*, 82 F. Supp.2d 19 (N.D.N.Y. 2000) (same); *People v. County of Otsego*, 99 Civ. 2239 (N.D.N.Y. 1999) (same).

Moreover, in nearly every state, blind voters are unable to cast secret ballots. Despite the availability of alterna-

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[10] For example, West Virginia had allowed indirect voting by the physically disabled only if they were going to be out of the state. *See* Miller, *supra*, at 30.

tives such as tape recorders, specially designed ballots, or voting machines with Braille, which would allow the blind to cast secret votes, these disabled voters must have a relative present to hear the vote, or worse, have an election official transcribe the vote given. Testimony of this particular plight was plainly before Congress. *See* Hearing before House Subcomm. on Select Educ., 101st Cong. 48-49 (Oct. 24, 1988).[11]

C. State Employers Have Classified and Treated People with Disabilities According to Stereotyped Conceptions of Capabilities.

People with physical or mental disabilities have also been subjected to invidious discrimination with respect to opportunities for employment, categorically excluded from the work force and faced with numerous arbitrary obstacles to entrance and advancement. *See* Disability Rights Education and Defense Fund, Inc., *Law Reform in Disability Rights, Employment Rights: History, Trends and Status* E-4 (1981). Not only must they overcome basic barriers such as restricted access to offices and other buildings in which they would work, but also overt discrimination by employers who choose not to hire individuals with disabilities for a variety of reasons ranging from prejudice to misconceptions regarding the abilities

[11] A similar story can be told about the states' discrimination against people with disabilities in the selection of individuals for jury service, another important civic right. Historically, many states had policies that prevented people with disabilities from performing juror service. Specific exclusionary clauses disqualified, for example, those "afflicted with permanent disease or physical weakness," Ga. Code Ann. § 59-714-6 (1965), or those "afflicted with a bodily infirmity amounting to a disability." Okla. Stat. Ann., tit. 38, § 28 (West 1979). A large number of states still retain laws that require jurors to possess their "natural faculties." *See, e.g.*, Alaska Stat. § 9.20.010 (Michie 1973). In addition to these statutory prohibitions, courthouses and courtrooms are frequently inaccessible to the disabled. *See* Andrew Weis, *Peremptory Challenges: The Last Barrier to Jury Service for People with Disabilities*, 33 Willamette L. Rev. 1, 4 (1997).

of people with disabilities. *See* Don F. Nicolai & William J. Risel, *Access to Buildings and Equal Employment Opportunities for the Disabled: Survey of State Statutes*, 50 Temp. L.Q. 1067, 1085 (1977).

As Congress concluded in its findings in the ADA,

> [D]iscrimination against individuals with disabilities persists in employment. . . . [There is] outright intentional exclusion, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, and . . . relegation to lesser jobs and opportunities.

42 U.S.C. § 12101. Indeed, statistical studies before Congress demonstrated that unemployment rates among people with disabilities are drastically higher than rates of unemployment for non-disabled people, and only a small percentage of Americans with disabilities who could work if given the opportunity are actually employed. *See Accommodating the Spectrum* 29;[12] H.R. Rep. 101-485, pt. 2, at 32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 314; S. Rep. No. 101-116, at 9 (1989).

Prior to the enactment of the ADA, certain people with disabilities were able to seek redress against state actors that received federal funding pursuant to the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1994). *See, e.g., School Bd. v. Arline*, 480 U.S. 273 (1987). *See also Chalk v. United States*, 840 F.2d 701 (9th Cir. 1988) (injunction

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[12] Indeed, throughout the 1980s, despite the enactment of the Education of the Handicapped Act of 1970, Pub. L. No. 91-230, 84 Stat. 175 (codified as amended 20 U.S.C. §§ 1400-1485 (1994)), and the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§701-796 (1994)), the percentage of people with disabilities who were employed fell sharply. In addition, the disparity between the average income of employed people with disabilities and the average income of people with no disability increased greatly. *See* H.R. Rep. No. 101-485, pt. 2, at 32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 314.

granted preventing school from transferring a teacher with AIDS to an administrative position). When considering the ADA, Congress was aware of *Arline* and the types of invidious employment discrimination that cases similar to *Arline* represented. *See* H.R. Rep. No. 101-485, pt. 2, at 30, 65, 71-72 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 312, 347, 353-54 (citing *Arline*); S. Rep. No. 101-116, at 7, 27, 34 (1989) (same). *See also Jackson v. State*, 544 A.2d 291 (Me. 1988) (state discriminated against person with diabetes by physical requirements in order to become a school bus driver).

In fact, through the ADA, Congress consciously addressed an incongruity left by the Rehabilitation Act—that a private right of action against the states for invidious discrimination was available only if the state received federal funds.[13] Congress found ample discrimination by the states and no evidence that the conduct was limited only to federally-funded state actors.[14]

II. WHETHER CONGRESS ACTED WITHIN ITS ENFORCEMENT POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT IS NOT DETERMINED BY THE LEVEL OF JUDICIAL SCRUTINY APPLIED TO CLASSIFICATIONS BASED ON DISABILITIES.

The fact that laws alleged to discriminate on the basis of disability are subject to rational basis review, rather than heightened scrutiny, should not be construed as lim-

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[13] The "resulting inconsistent treatment of people with disabilities by different State or local government agencies is both inequitable and illogical for a society committed to full access for people with disabilities." H.R. Rep. No. 101-485, pt. 2, at 37 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 319.

[14] Discrimination against people with disabilities in employment can be expected to be treated in other briefs to this Court, and therefore, the ABA seeks to avoid duplicating those arguments here.

iting the meaning of the mandate of the Equal Protection Clause. Indeed, the finding of discrimination in *Cleburne* supports the conclusion that Congress acted properly within its Section 5 powers in passing Titles I and II of the ADA.

A. The Rational Basis Test is a Doctrine of Judicial Restraint, Not an Assessment of the Scope of Congressional Authority.

The rational basis test was judicially created to give state legislatures wide latitude to address societal problems where courts have less competence, *see Cleburne*, 473 U.S. at 439-40, and is deferential in nature to prevent courts from over-reaching their judicial function. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Nonetheless, the test also serves to prohibit irrational classifications. Indeed, the decision to apply the rational basis test to classifications based on disability rested, in part, on this Court's stated concern, given the variation in the abilities and needs of people with disabilities, that "governmental bodies must have a certain amount of flexibility and freedom from judicial oversight in shaping and limiting their remedial efforts." *Cleburne*, 473 U.S. at 445.

This deference to legislative flexibility, though, does not take discrimination on the basis of disability out of the ambit of the Equal Protection Clause. To the contrary, this Court applies the rational basis standard to afford the latitude necessary for legislators to pursue policies to assist individuals with disabilities in fully engaging in activities and enjoying their right to equal protection under the law. *See Cleburne*, 473 U.S. at 446-47.[15] Absent some reason

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[15] The recognition that individuals with disabilities may require different treatment in order to guarantee equal protection is at the heart of the "reasonable accommodation" requirement of the ADA. *See* 42 U.S.C. § 12112(b)(5)(A).

to infer antipathy, it is presumed that "even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely [the Court] may think a political branch has acted." *Beach Communications*, 508 U.S. at 314 (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)). The rational basis standard is thus, "a paradigm of *judicial* restraint." *Id.* at 314 (emphasis added).

The rational basis test, however, is not toothless. Indeed, the zoning ordinance at issue in *Cleburne* provided an example of a governmental action that rested on "an irrational prejudice against the mentally retarded," and this Court unanimously found it invalid on that basis. *Cleburne*, 473 U.S. at 450. Thus, the more permissive standard of review does not preclude a finding that irrational or invidious differential treatment on the basis of disability constitutes a violation of the Constitution.

To rule otherwise would be to undermine the foundation of equal protection jurisprudence. The development of levels of scrutiny for different classifications was judicially created for the purpose of flushing out discriminatory behavior, not to confine the domain of the Equal Protection Clause. *See* John Hart Ely, *Democracy and Distrust* 146 (1980) (citing Larry G. Simon, *Racially Prejudicial Governmental Actions: A Motivation Theory of the Constitutional Bar Against Racial Discrimination*, 15 San Diego L. Rev. 1041 (1978)). The Fourteenth Amendment prohibits invidious and irrational discrimination by the states even if it is not based on a suspect classification. This Court expressly stated in *Romer v. Evans*, 517 U.S. 620 (1996), that "[b]y requiring that the classification bear a rational relationship to an independent and legitimate legislative end, [the Court] ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* at 633.

Indeed, the categories of scrutiny this Court utilizes are not static, and absurd results would follow were the standard of judicial scrutiny the measure for determining the breadth of legislative authority. Nor could it be said that the level of review afforded a particular classification was a reliable indicator of whether unconstitutional discrimination against that group was prevalent. In fact, during certain periods in our nation's history, discrimination on the basis of race and gender was not subjected to a heightened level of scrutiny. *See, e.g., Yick Wo*, 118 U.S. at 356 (race); *Reed v. Reed*, 404 U.S. 71 (1971) (gender). The level of scrutiny applied was simply not tied to whether unconstitutional discrimination existed. In *Reed*, for example, this Court applied the rational basis test, but shortly thereafter classifications based upon gender were elevated to a heightened standard of review. *See Reed*, 404 U.S. at 71; *Craig v. Boren*, 429 U.S. 190, 197 (1976). Had Congress acted to prevent or remedy discrimination on the basis of sex in 1971, surely the abrogation of sovereign immunity would not have been invalid simply because the law was enacted during the time courts applied the rational basis test.

B. Congress' Authority to Remediate Unconstitutional Discrimination Against People with Disabilities Includes the Power to Proscribe Some Conduct That May Be Constitutional.

The scope of Congressional authority to enforce the provisions of the Fourteenth Amendment and, in particular, the Due Process and Equal Protection Clauses, is not controlled by the level of scrutiny applied by courts and not limited to classifications or government actions that trigger strict scrutiny. It is, instead, based on a constitutional role to protect individuals against invidious discrimination regardless of a person's disfavored status. This conclusion is consistent with the principle that

Congress has broad power to enact legislation to enforce the guarantees of the Fourteenth Amendment even when, in the process, the legislation prohibits conduct that is not in itself unconstitutional. *See Kimel*, 120 S. Ct. at 644 (citing *City of Boerne*, 521 U.S. at 518). For example, this Court held in *City of Rome v. United States*, 446 U.S. 156 (1980), that Congress could prohibit changes in electoral schemes with discriminatory effects even as it held, the same day in *Mobile v. Bolden*, 446 U.S. 55 (1980), that such schemes do not, of themselves, violate the Fifteenth Amendment. *See also Gregory v. Ashcroft*, 501 U.S. 452 (1991) ("[I]t is one thing to limit judicially created scrutiny, and it is quite another to fashion a restraint on Congress' legislative authority . . . the latter is both counter-majoritarian and an intrusion on a co-equal branch of the Federal Government." (White, J., concurring and dissenting)). Recently, in *Lopez v. Monterey County*, 525 U.S. 266 (1999), this Court upheld the Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1994), recognizing Congress' authority to require federal pre-clearance of changes in state and local voting laws even when the laws themselves have not been found to be unconstitutional. *See also South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (allowing Congress to enforce the Fifteenth Amendment by suspending literacy tests despite the facial constitutionality of tests under *Lassiter*).

C. *Cleburne* Demonstrates the Existence of Unconstitutional Behavior.

This Court held in *Cleburne* that the City of Cleburne had violated the Equal Protection Clause by requiring a group home for people with mental retardation to obtain a special use permit, when it did not require such a permit for apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, or dormitories. *See Cleburne*, 473 U.S. at 447. The Court held that

despite the fact that states shall have the "latitude necessary" to legislate with respect to people with disabilities, such legislation may only affect the rights of the disabled in an "incidental manner." *Id.* To pass constitutional muster, states must be able to demonstrate a real relationship between the classification utilized and the asserted goal to be fostered by the legislation, and not simply rely upon an attenuated relationship, or the bare desire to harm a politically unpopular group. *See Zobel v. Williams*, 457 U.S. 55, 63 (1982); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 535 (1973). Consequently, the Court found that the group home posed no special threat to any legitimate state interest, and presented no more of a threat than a host of other uses. Requiring the special use permit, therefore, violated the Constitution. While states have the latitude to assist people with disabilities to reach their full potential, when they actively engage in activities that burden individuals with disabilities, they may do so only in an "incidental manner." *Cleburne*, 473 U.S. at 446.

III. STATE CLASSIFICATIONS BASED ON DISABILITY, LIKE THOSE BASED ON RACE, ETHNICITY AND GENDER, HAVE REFLECTED STEREOTYPES, STIGMA, AND PREJUDICE AND ARE RIGHTLY WITHIN THE PURVIEW OF THE FOURTEENTH AMENDMENT.

A. Many of the Same Psychological and Sociological Factors That Underlie Discrimination Against People With Disabilities Also Underlie Discrimination Based on Race and Gender.

In its equal protection jurisprudence, this Court has recognized that certain state actions classifying individuals are the product of illegitimate motivations. This Court has rejected state classifications and state actions based on

stereotyping, *see, e.g., United States v. Virginia*, 518 U.S. 515 (1996); stigmatization, *see, e.g., Brown v. Board of Education*, 347 U.S. 483 (1954); and psychological discomfort with a minority's differences, *see, e.g.,Watson v. Memphis*, 373 U.S. 526 (1963); *Palmore v. Sidoti*, 466 U.S. 429 (1984). Significantly, the history of state treatment of people with disabilities has been marked by actions based on these same underlying motivations. *See* Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 399-407 (1991).

Classifications based on gender stereotypes, that is, on assumptions about what characteristics and capabilities attach to being male or female, have been held illegitimate both because they are often inaccurate as to individuals disadvantaged by the classification and because they run the risk of perpetuating the very assumptions they reflect. *See, e.g., United States v. Virginia*, 518 U.S. at 533; *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 139 n.11 (1994); *Orr v. Orr*, 440 U.S. 268, 283 (1979). While this Court's opinion in *Cleburne* makes clear that classifications based on mental retardation that rely on judgments regarding the characteristics of people with mental retardation may in some instances be sanctioned, this Court nonetheless refused to accept a justification for a governmental action that was based purely on stereotype. *Cleburne*, 473 U.S. at 432 ("[I]t is difficult to believe that the groups of mildly or moderately mentally retarded individuals who would live at 201 Featherston would present any different or special hazard.").

People with disabilities have often been disadvantaged by the prevalence of stereotypes about their abilities and behavior. Like members of racial and ethnic groups, and women, they have been barred from public educational and employment opportunities as a result of generally erroneous assumptions about their skills and behavior.

See, e.g., Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972); *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972). *See also* Nicolai & Risel, *supra*, at 1085 (employment). Finally, just as women were once barred from voting and from serving on juries, so too have many individuals with disabilities been denied access to these civic rights and responsibilities, notwithstanding that they were quite capable of exercising them.

As this Court pointed out in *Brown*, stigmatization, the marking of one group as less worthy than another, occurs when one group is set aside from society. *Brown*, 347 U.S. at 494 ("to separate [children] . . . solely because of their race generates a feeling of inferiority as to their status in the community"). For racial groups and women, the judgment that certain groups are less worthy or have inferior capacities has often taken the form of laws excluding the disfavored group from public institutions, accommodations and opportunities, as in cases restricting the entry of blacks or women into state educational programs, jury duty, and access to certain professions. *See, e.g., United States v. Virginia*, 518 U.S. at 515 (gender); *J.E.B.*, 511 U.S. at 131 n.2 (exclusion of women from jury duty); *Reed*, 404 U.S. at 71 (men preferred as administrators); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (denial of right to serve on a jury "is practically a brand . . . affixed by law, an assertion of their inferiority"); *Bradwell v. Illinois*, 16 Wall 130 (1873) (bar against women in the legal profession); *Geier v. University of Tennessee*, 597 F.2d 1056 (6th Cir. 1979) (race). Similarly, people with disabilities have also been excluded from many of these same public services, institutions and opportunities, and have been stigmatized as a result. *See supra*, in Point I.B., C.

This Court has recognized with regard to racial discrimination that psychological discomfort with or a desire

to separate from those who are different is an unacceptable motivation for state action. *See, e.g., Palmore*, 466 U.S. at 433-34; *Watson*, 373 U.S. at 526; *Buchanan v. Warley*, 245 U.S. 60 (1917). The desire to separate from those who are different has also been a factor in the development of state policies concerning people with disabilities: for example, "a desire to segregate handicapped people from the rest of society prompted the development of residential institutions." *Accommodating the Spectrum* 34. In *Cleburne*, this Court concluded, "mere negative attitudes or fear . . . are not permissible bases for treating a home for the mentally retarded differently." *Cleburne*, 473 U.S. at 448. As the Court stated in *O'Connor*, the state "cannot fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different." *O'Connor*, 422 U.S. at 574-75.[16]

B. The History of Discrimination Against People with Disabilities Demonstrates that They Have Been Segregated, Discriminated Against, and Stripped of Fundamental Rights by States in a Manner Similar to the History of Discrimination Based on Race and Gender.

In contrast to the legislative record examined in *Kimel*, the ample record before Congress when it enacted the ADA included discrimination rising to the level of constitutional violations. In its deliberations on the ADA,

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[16] In the early twentieth century in the United States, even forced sterilization of the mentally and physically disabled was not uncommon. *See* Robert L. Burgdorf, Jr. & Marcia Pearce Burgdorf, *The Wicked Witch is Almost Dead:* Buck v. Bell *and the Sterilization of Handicapped Persons*, 50 Temp. L.Q. 995 (1977). In 1930, 28 states had legislation permitting forced sterilization, *see id.*, and it is estimated that, by 1963, almost 64,000 persons had been involuntarily sterilized under state eugenic sterilization laws. *See* Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 Duke L.J. 806, 865 n.2 (1986).

Congress found that people with disabilities have been "subjected to a history of purposeful unequal treatment," in such critical areas as "housing, employment, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101. Congress further found that individuals with disabilities have been "relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals. . . ." *Id.*[17] Although not identical to the history of discrimination on the basis of race, ethnicity, and gender, the history of discrimination against people with disabilities shows that states have also subjected them to forms of segregation and discrimination, and deprived them of basic rights.

This Court has long seen segregation, as well as the stigmatization that derives from it, as one of the great evils of both race and gender based discrimination. *See Brown*, 347 U.S. at 483, *United States v. Virginia*, 518 U.S. at 515; *Watson*, 373 U.S. at 526. It rejected residential discrimination as long ago as 1917, when it invalidated a Kentucky law forbidding blacks to buy homes in white neighborhoods. *See Buchanan*, 245 U.S. at 60; *Jones v. Mayer*, 392 U.S. 409 (1968) (private refusal to sell); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (enforcement of restrictive covenants). And, in 1954, this Court ruled, resoundingly, that "in the field of public education the doctrine of 'separate but equal' has no place." *Brown*, 347 U.S. at 493. It has also rejected state sponsored segregation on the basis

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[17] *Amicus* is not arguing here that classifications based on disability should be accorded heightened scrutiny, an issue decided in *Cleburne*, 473 U.S. at 432. The ABA submits, however, that the history of state conduct, including warehousing individuals in state-run institutions—and the horrendous conditions that were allowed to exist for years—demonstrates that states have discriminated against people with disabilities and reflects some of the barriers faced by people with disabilities to seeking redress.

of both race and sex in higher education, *see, e.g., Sweatt v. Painter*, 339 U.S. 629 (1950) (race); *United States v. Virginia*, 518 U.S. at 515 (gender), and has refused to permit race and gender based exclusion from such public institutions as jury duty and voting. *See, e.g., J.E.B.*, 511 U.S. at 127 (gender); *Frontiero v. Richardson*, 411 U.S. 677, 684-685 (1973) (discussion of exclusion from voting); *Strauder*, 100 U.S. at 303 (race). Common to all these cases is a recognition of the harm done to a group excluded from the fundamental aspects of civic life.

As discussed *supra*, in Point I.A., people with disabilities similarly have been subjected to state sanctioned segregation and exclusion. *See, e.g., Timothy W. v. Rochester, New Hampshire School Dist.*, 675 F.2d 954 (1st Cir. 1989) (exclusion from public school); *Campbell v. Talladega County Bd. of Educ.*, 518 F. Supp. 47 (N.D. Ala. 1981) (same); *Mills*, 348 F. Supp. at 866 (exclusion from public school); *Pennsylvania Ass'n for Retarded Children*, 343 F. Supp. at 297 (relegation to separate and unequal education facilities).[18]

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[18] This Court has consistently acknowledged the historical segregation of individuals with disabilities in education by noting the significant evidence before Congress that prompted the passage of the Education of the Handicapped Act of 1970, Pub. L. No. 91-230, 84 Stat. 175 (codified as amended at 20 U.S.C. §§ 1400-1485 (1994)). *See Honig v. Doe*, 484 U.S. 305, 309 (1988); *Board of Educ. v. Rowley*, 458 U.S. 176, 178-79 (1982). In *Honig*, this Court indicated that when the Act was passed, "one out of every eight [disabled] children was excluded from the public school system altogether," citing 20 U.S.C. § 1400(b)(4), and "many others were simply 'warehoused' in special classes or were neglectfully shepherded through the system until they were old enough to drop out." *Honig*, 484 U.S. at 309 (citing H.R. Rep. No. 94-332, pt. 2 (1975)).

IV. THE STATUTORY LANGUAGE AND MANDATES OF THE ADA ARE WELL WITHIN CONSTITUTIONAL BOUNDS.

Section 5 of the Fourteenth Amendment is an affirmative grant of power to Congress. "It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." *Kimel*, 120 S. Ct. at 644 (quoting *City of Boerne*, 521 U.S. at 520; *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)). In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), this Court defined valid efforts to exercise Congress' powers under Section 5 of the Fourteenth Amendment: "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Florida Prepaid*, 527 U.S. at 638 (quoting *City of Boerne*, 521 U.S. at 519-20). As the Court reiterated in *Kimel*, Congress' power to enforce the guarantees of the Fourteenth Amendment is not confined to the precise prohibitions contained therein. *Kimel*, 120 S. Ct. at 644 (citing *City of Boerne*, 521 U.S. at 518); *supra* in Point II.B.

As both the United States Senate and House of Representatives recognized toward the end of the 1980s, then current laws were "inadequate" to combat "the pervasive problems of discrimination that people with disabilities [were] facing." S. Rep. No. 101-116, at 18 (1989); H.R. Rep. No. 101-485, pt. 2, at 47 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 329. The Senate recognized the need for "omnibus civil rights legislation" for the disabled. S. Rep. No. 101-116, at 19 (1989). Similarly, the House addressed the need for legislation that "will finally set in place the necessary civil rights protections for people with disabilities." H.R. Rep. No. 101-485, pt. 2, at 40 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 322.

The remedy Congress crafted in the ADA, which considers the economic benefits and costs of the conduct at issue and which provides clear standards for identifying discrimination, is proportional with and congruent to the invidious and irrational state conduct documented over time and discussed in this brief. The congruence of the remedy is exemplified by the fact that the statute requires only *reasonable* accommodation. *See* 42 U.S.C. § 12111(9) (reasonable accommodation). Although comprehensive in coverage, the ADA also contains a number of other significant limits. *See, e.g.*, 42 U.S.C. §§ 12102(2) (definition of disability), 12111(10) (undue hardship), 12113 (general defenses and qualification standards). Under the ADA's employment provisions, employers are not required to hire individuals who are not qualified for a particular job or to give preference to applicants with disabilities over equally qualified or more qualified nondisabled applicants. *See* EEOC Interpretive Guidance, Background, 29 C.F.R. § 1630 (1998). There are also outright defenses to a charge of discrimination, including job-related exclusion and business necessity, *see* 42 U.S.C. § 12113(a), imposition of a threat to the health and safety of others in the work place, *see id.* § 12113(b), and dangers posed by certain communicable diseases among food service workers. *See id.* § 12113(d).[19] Also, an employer is not required to make an accommodation that would impose an "undue hardship" on the operation of business. 42 U.S.C. § 12112(b)(5)(A). The statute pro-

[19] Indeed, the ABA's 1989 resolution called for federal legislation that takes into consideration the economic benefits and costs, and provides clear standards for identifying such discrimination, and the ADA more than meets these criteria. The ADA was a measured response, balancing the goal of integration of individuals with disabilities into society with competing state interests such as efficiency in the work force. *See* Roger C. Hartley, *The New Federalism & the ADA: State Sovereign Immunity from Private Suits after* Boerne, 24 N.Y.U. Rev. L. & Soc. Change 481 (1998).

vides that "undue hardship" means "an action requiring significant difficulty or expense" in light of such considerations as the nature of the accommodation; the overall financial resources of the employer; the total number of employees at the facility; and the effect of the accommodation on the operation of the facility; as well as the type of operation involved, its fiscal makeup, and geographic location. *See* 42 U.S.C. § 12111(10)(A)-(B).

Pursuant to the ADA, states may not discriminate in their employment practices against people with disabilities, except in an incidental manner in order to achieve legitimate aims. *See id.* §§ 12111(5)(A), 12112. Where the burden is more than incidental, the ADA provides that the employee is entitled to an accommodation that must be reasonable. *See id.* § 12112(b)(5)(A). If no reasonable accommodation can be made that will permit the individual to do the job at issue, and the individual cannot do the job without accommodations, the employer may treat the disabled employee differently, and even may deny him employment. *See id.* § 12113.

Indeed, the ABA Commission's studies have found that it is very difficult for plaintiffs to prevail under the ADA. *See 1999 Employment Decisions Under the ADA Title I Survey Update*, 24 Mental & Physical Disability L. Rep. 348 (2000). The ADA's approach is, thus, quite different from that of the ADEA, at issue in *Kimel*. The ADEA prohibited all employment discrimination on the basis of age against people over the age of 40 years old. *See* 29 U.S.C. § 623(a)(1). The only relief from this broad prohibition appeared in the rules enacted under the ADEA. By their own terms, these rules are to be interpreted narrowly and require that employers demonstrate a substantial basis for the belief that all or nearly all employees above a given age are unqualified for a certain position or that individual testing is totally impractical. *See Kimel*, 120 S. Ct. at 647-48.

In contrast, the ADA's incorporation of a "reasonableness" standard to its duty to accommodate and its use of explicit economic considerations favorable to the employer demonstrate that the statute is congruent and proportional to the harm addressed. In drafting the ADA, Congress properly balanced the states' interests with the goal of protecting people with disabilities from unconstitutional state action. It did so by clearly limiting the economic burdens posed by the statute's requirements. The ADA is a measured response by Congress entitled to deference; it is well within the parameters of congruence and proportionality and is, therefore, constitutional.

CONCLUSION

The judgment of the Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully Submitted,

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APPENDIX

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Ala. Const. art. VIII, § 182; Alaska Const. art. V, § 2; Ark. Const. art. III, § 5; Cal. Const. art. II, § 4; Del. Const. art. V, § 2; Fla. Const. art. VI, § 4(a); Ga. Const. art. II, § 1(3)(b); Haw. Const. art. II, § 2; Iowa Const. art. II, § 5; Ky. Const. § 145(3); La. Const. art. I, § 10(A); Me. Const. art. II, § 1; Md. Const. art. I, § 4; Mich. Const. art. II, § 2; Minn. Const. art. VII, § 1; Mo. Const. art. VI, § 2; Mont. Const. art. IV, § 2; Neb. Const. art. VI, § 2; N.J. Const. art. VI, § 1(6); N.M. Const. art VII, § 1; Ohio Const. art V, § 6; R.I. Const. art. II, § 1; S.C. Const. art. II, § 7; S.D. Const. art. VII, § 2; Tex. Const. art. VI, § 1; Utah Const. art. IV, § 6; Va. Const. art. II, § 1; Wash. Const. art. VI, § 3; W. Va. Const. art. IV, § 1; Wyo. Const. art. 6, § 6; Ariz. Rev. Stat. § 16-101(A)(6) (1984); Mass. Gen. Laws Ch. 51, § 1 (1999); Miss. Code Ann. § 241(1) (1991); Wis. Stat. § 6.03(3) (1999).